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No. 92-744

In the Supreme Court of the United States

OCTOBER TERM, 1992

KRAFT, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 15 U.S.C. 45(c), which requires that findings of the Federal Trade Commission be affirmed if supported by substantial evidence, violates the First Amendment as applied to the Commission's factual finding that a particular false claim has been made in an advertisement.

2. Whether the Federal Trade Commission may rely upon its own reasoned analysis of an advertisement, without resort to extrinsic evidence such as consumer surveys, to find that an advertiser has made an implied claim that is reasonably apparent from the face of the advertisement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 970 F.2d 311. The opinion and order of the Federal Trade Commission (Pet. App. 29a-78a) and the initial decision of the administrative law judge are not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 79a-80a) was entered on July 31, 1992. The petition for a writ of certiorari was filed on October 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech." Sections 5, 12, and 15 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45, 52, and 55, and Section 43(a) of the Lanham Trade-Mark Act (Lanham Act), 15 U.S.C. 1125(a), are set forth at Pet. App. 81a-87a.

STATEMENT

1. Petitioner markets "Kraft Singles," which are individually wrapped slices of "pasteurized process cheese food." Kraft Singles compete with "imitation" and "substitute" cheese slices. "Imitation" cheese slices, which are typically made from water, vegetable oil, flavoring agents, and fortifying ingredients, are defined by the Food and Drug Administration (FDA) as "nutritionally inferior" to pasteurized process cheese food slices, but they may contain more of certain nutrients (*e.g.*, calcium) than do their dairy counterparts. "Substitute" cheese food slices contain less cheese than pasteurized process cheese food slices, but are not "nutritionally inferior" and need not be labeled "imitation." Pet. App. 2a, 33a-34a & n.2.[1]

In the early 1980s, Kraft Singles began to lose market share to an increasing number of non-dairy imitation slices that were advertised as both less expensive and more nutritious than dairy slices such

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[1] Consistent with usage by the court of appeals (Pet. App. 2a), petitioner (Pet. 3 n.2), and the Federal Trade Commission (Pet. App. 34a n.2), we will use the term "imitation slices" to denote both imitation and substitute slices.

as Kraft Singles. In response, petitioner created the "Five Ounces of Milk" campaign, which emphasized the fact that a slice of Kraft Singles is made from five ounces of milk, while imitation slices use very little milk, or are made predominantly from vegetable oil and water. Pet. App. 2a, 33a-34a.

As part of this campaign, petitioner developed the so-called "Skimp" advertisements, which ran nationally from February 1985 through June 1987. The Skimp advertisements were designed to communicate the nutritional benefit of Kraft Singles by referring expressly to calcium as the key nutritional element. Petitioner focused on calcium in order to capitalize on high consumer interest in that nutrient and to respond to advertising promoting other products, including imitation slices, as good sources of calcium. Pet. App. 3a-4a, 33a-35a.

Representative audio copy from one of the Skimp television advertisements states:

> Imitation slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow.

Pet. App. 42a. When the audio portion of the advertisement mentioned imitation slices, the visual image showed a small amount of milk being poured into the bottom of a glass. As the audio stated that Kraft has "five ounces" and "calcium," the glass filled with milk to the five-ounce mark. The advertisement also showed milk being poured into a glass and gradually transforming into a package of Kraft Singles bearing the phrase "5 oz. milk slice." *Id.* at 4a, 42a, 72a-73a.

A second series of advertisements, known as the "Class Picture" advertisements, ran nationally from June 1986 through January 1987. Although the

Class Picture advertisements stated that Kraft Singles are made from five ounces of milk per slice "[s]o they're concentrated with calcium," they did not expressly compare Kraft Singles to imitation slices. Pet. App. 4a-5a, 35a. The Class Picture advertisements were disseminated with a superscript that stated, "One ¾ ounce slice has 70% of the calcium of five ounces of milk." *Id.* at 49a.

Although a slice of Kraft Singles is made from five ounces of milk, each slice actually contains only 70% of the calcium of five ounces of milk, because a substantial portion of the calcium is lost in processing. Moreover, the vast majority of imitation slices sold in the United States during the relevant time period contained at least as much calcium as a slice of Kraft Singles. Pet. App. 3a, 37a-38a. In view of these underlying facts, petitioner began to receive complaints that its advertisements falsely implied that a slice of Kraft Singles contained the same amount of calcium as five ounces of milk (the "milk equivalency" claim) and that Kraft Singles contained more calcium than most imitation cheese slices (the "imitation superiority" claim). *Id.* at 19a, 26a, 67a-68a.

Nonetheless, petitioner persisted in running the Skimp and Class Picture advertisements. Petitioner did eventually make three modifications to the advertisements, however. In January 1986, petitioner revised the Skimp advertisement by changing the assertion "Kraft *has* five ounces per slice" to "Kraft *is made from* five ounces per slice." Pet. App. 42a (emphasis added).[2] Thereafter, in March 1987, near

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[2] Petitioner concedes, however, that this was "not a change in substance" and did not alter the advertisement's meaning. Tr. 1553.

the end of the Skimp campaign, petitioner added the disclosure that "one ¾ ounce slice has 70% of the calcuim of five oz. of milk." *Id.* at 43a. Petitioner also made an additional minor modification at that time. *Id.* at 43a n.10.

2. On June 17, 1987, the Federal Trade Commission (Commission) issued an administrative complaint charging that petitioner had violated Sections 5(a) and 12 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(a) and 52, by making the false milk-equivalency and imitation-superiority claims in its Skimp and Class Picture advertisements. Petitioner was also charged with failing to possess and rely upon a reasonable basis for those challenged claims. Pet. App. 35a-36a.

After holding evidentiary hearings, the administrative law judge (ALJ) found petitioner had made the two challenged claims in both the Skimp and Class Picture advertisements. Moreover, the ALJ found that those claims were material, and that they were false and lacked a reasonable basis. Accordingly, the ALJ ordered petitioner to cease and desist from making those claims. Pet. App. 36a; see also *id.* at 5a.

3. Petitioner appealed to the Commission, challenging the ALJ's determinations that the claims had been made, that they were material, and that a remedial order was necessary. Petitioner did not contest the finding that the challenged claims, if made, were false and unsubstantiated. Pet. App. 36a-37a.

The Commission affirmed the ALJ's decision with some modifications. Pet. App. 29a-78a. In particular, the Commission agreed with the ALJ that petitioner had made both of the challenged claims. *Id.* at 6a, 55a.

The Commission identified several components of the Skimp advertisements that contributed to conveying the milk-equivalency claim: (1) the use of the word "has" in the phrase "Kraft has five ounces [of milk] per slice"; (2) repetition of the precise amount of milk—five ounces—in a Kraft Single, followed by an express reference to calcium; (3) use of the causal word "so" to link the reference to five ounces of milk with the reference to calcium; and (4) the visual image of milk being poured into a glass up to the five-ounce mark, and the superimposition of that image onto a package of Kraft Singles. Pet. App. 6a, 43a-44a.[3]

The Commission also found two elements of the Skimp advertisements that helped convey the imitation-superiority claim: (1) the express reference to imitation slices, coupled with the use of comparative language ("hardly any," "but"); and (2) the visual image of a glass containing very little milk during the audio reference to imitation slices, followed by the image of the glass being filled to the five-ounce mark while the corresponding audio referred to Kraft Singles and stated "so her little bones get calcium they need to grow." Pet. App. 6a, 51a. Although these findings were based initially upon the Commission's own analysis of the evidence present on the face of the advertisements, the Commission also

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[3] The Commission also found that the subsequent modifications to the Skimp advertisements were not sufficient to dispel the overall false impression of milk equivalency. Pet. App. 44a. In particular, the Commission found that the superimposed caption stating that "one ¾ ounce slice has 70% of the calcium of five ounces of milk" appeared only briefly in one frame of the television commercial in conjunction with another caption, and thus was unlikely to be effective as a corrective measure. *Ibid.*

examined the available extrinsic evidence and concluded that the reliable extrinsic evidence fully supported its determinations. *Id.* at 47a & n.13, 51a & n.15.

The Commission next examined the Class Picture advertisements and found that they were substantially similar to the Skimp advertisements and thus conveyed the milk-equivalency claim. Pet. App. 48a-50a.[4] The Commission noted that this conclusion could be supported by the advertisements themselves, but was also consistent with the weight of the probative extrinsic evidence in the record. *Id.* at 50a & n.14.

The Commission rejected, however, the ALJ's finding that the Class Picture advertisements conveyed the imitation-superiority claim. The Commission explained that the advertisements contained no explicit comparisons between Kraft Singles and non-dairy slices, and also contained no visual cues to prompt such a comparison. Because the imitation-superiority claim was thus not facially apparent, the Commission turned to the extrinsic evidence and, finding it insufficient, was unable to conclude that the claim was made by the Class Picture advertisements. Pet. App. 52a-55a.

The Commission also found that the false claims made by the advertisements were material to consumers. Pet. App. 6a, 58a-65a. To halt and prevent recurrence of petitioner's deceptive practices, the Commission adopted, in all pertinent respects, the

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[4] For the same reasons that led the Commission to conclude that the superimposed disclaimer was ineffective as a corrective measure with respect to the Skimp advertisements, it found that the equivalent disclaimer in the Class Picture advertisements was similarly ineffective. Pet. App. 49a-50a.

ALJ's remedial order prohibiting false or unsubstantiated nutrient-content claims. *Id.* at 7a, 65a-69a.

4. The court of appeals enforced the Commission's order in its entirety. Pet. App. 1a-28a. The court first rejected petitioner's claim that *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and *Peel* v. *Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990), required it to conduct an independent, *de novo* review of the Commission's factual findings concerning the claims made by petitioner's advertisements. Pet. App. 7a-9a. The court explained that the "substantial evidence" test is the standard of review traditionally applied to such factual findings by the Commission, and that, under this Court's decision in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385-386 (1965), the substantial-evidence standard is appropriate because of the Commission's extensive experience in this area and because its findings necessarily rest heavily "on inference and pragmatic judgment." Pet. App. 7a.

The court of appeals found petitioner's reliance on *Bose* and *Peel* unpersuasive, for several reasons. First, the court noted that it is at best unclear whether *Bose*, a libel case, has any application to cases involving mere commercial speech. Second, the court reasoned that *Bose* and *Peel* should not be read to overrule by implication a directly controlling precedent like *Colgate-Palmolive*. The court explained:

> [T]here are important distinctions between the sort of appellate review conducted in *Bose* and *Peel* and that done in *Colgate-Palmolive* and this case. The former involved review of court decisions, and courts generally lack the Commis-

> sion's expertise in the field of deceptive advertising.

Pet. App. 8a. Finally, the court concluded that *Peel* is clearly distinguishable from this case. *Peel* involved a prophylactic regulation prohibiting an entire category of commercial speech on the ground that it was potentially misleading as a matter of law. In this case, by contrast, the Commission made factual findings that particular advertisements conveyed specific false claims. Accordingly, the court concluded that the substantial-evidence standard governed its review of the Commission's factual findings concerning the claims made by petitioner's advertisements. *Id.* at 8a-9a.

The court of appeals next rejected petitioner's contention that the Commission erred as a matter of law in finding implied claims without resorting to extrinsic evidence such as consumer surveys. Pet. App. 10a-14a. The court noted that "[c]ourts, including the Supreme Court, have uniformly rejected imposing such a requirement on the FTC." *Id.* at 12a-13a. Adhering to this settled law, the court reaffirmed that "the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement." *Ibid.*

The court of appeals identified two flaws in petitioner's contention that the Commission must always rely on extrinsic evidence in finding that advertising contains an implied claim. First, the court explained:

> [Petitioner's contention] rests on the faulty premise that implied claims are inescapably subjective and unpredictable. In fact, implied claims

> fall on a continuum, ranging from the obvious to the barely discernible. * * * The implied claims [petitioner] made are reasonably clear from the face of the advertisements, and hence the Commission was not required to utilize consumer surveys in reaching its decision.

Pet. App. 13a. Second, the court concluded that petitioner's reliance on deceptive-advertising cases decided under the Lanham Act was misplaced. While courts in those cases have sometimes relied on extrinsic evidence, they have done so "because they are ill equipped—unlike the Commission—to detect deceptive advertising." *Id.* at 14a.

The court of appeals also rejected petitioner's contention that permitting the Commission to interpret advertisements without reference to extrinsic evidence would chill truthful commercial speech in violation of the First Amendment. Pet. App. 14a-16a. The court concluded that this claim was foreclosed by *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 652-653 (1985), which held that "no first amendment concerns are raised when facially apparent implied claims are found without resort to extrinsic evidence." Pet. App. 15a.

Furthermore, the court of appeals observed that extrinsic evidence was, in fact, available to and relied on by the Commission in this case. The court noted that the Commission thoroughly examined the available extrinsic evidence and found that it supported the Commission's findings. Pet. App. 16a.[5]

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[5] The court of appeals also rejected petitioner's remaining challenges to the Commission's order. The court concluded, *inter alia*, that substantial evidence supported the Commission's findings that the Class Picture advertisements made the milk-equivalency claim and that both of the challenged

Judge Manion concurred in the opinion and judgment of the court. Pet. App. 27a-28a. As a policy matter, however, he recommended that the Commission utilize its expertise to "develop a consumer survey methodology that advertisers can use to ascertain whether their ads contain implied, deceptive messages." *Id.* at 28a.

ARGUMENT

1. a. The FTC Act provides that the Commission's factual findings must be affirmed "if supported by evidence." See FTC Act § 5(c), 15 U.S.C. 45(c). In keeping with that statutory command, this Court and the courts of appeals have uniformly held that the Commission's factual determination that a particular claim was made in an advertisement must be upheld if it is supported by "substantial evidence." See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1965); *Removatron Int'l Corp.* v. *FTC*, 884 F.2d 1489, 1496-1497 (1st Cir. 1989); *Thompson Medical Co.* v. *FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987); *Bristol-Myers Co.* v. *FTC*, 738 F.2d 554, 562 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); *American Home Prods. Corp.* v. *FTC*, 695 F.2d 681, 686-687 (3d Cir. 1982).[6]

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claims were material to consumers. Pet. App. 17a-21a. Finally, the court approved the scope of the Commission's order as no broader than reasonably necessary to prevent deception, and therefore not violative of the First Amendment. *Id.* at 22a-24a. The court also concluded that the breadth of the order was reasonably related to petitioner's violations, and was justified by the need to prevent future violations. *Id.* at 24a-27a.

[6] Contrary to petitioner's contention (Pet. 10), the substantial-evidence test requires more than "only the most per-

Petitioner contends (Pet. 11-20), however, that this Court's decisions in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and *Peel* v. *Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990), mandate reconsideration of the settled rule that the Commission's factual findings are reviewed under the substantial-evidence standard. According to petitioner, *Bose* and *Peel* require *de novo* review of the Commission's findings that advertisements are deceptive and thus not entitled to First Amendment protection. Petitioner's reliance on *Bose* and *Peel* is misplaced.

Bose was not a commercial-speech case at all. Rather, it involved an action for product disparagement—in essence, a libel suit—and the Court held only that, "in reviewing a determination of actual malice in a case governed by *New York Times Co.* v. *Sullivan*[, 376 U.S. 254 (1964)]," appellate courts "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." 466 U.S. at 514; see also *id.* at 511. *Bose* did not purport to decide whether a similar rule should be fashioned for cases involving commercial speech.

The *Bose* Court did observe that independent appellate review is required in cases involving certain other

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functory, deferential judicial review." Although substantial-evidence review does entail some deference to the Commission's expertise in interpreting advertisements, the standard nonetheless requires courts to assess the reasonableness and supportability of the Commission's interpretation. See, *e.g.*, *Removatron Int'l Corp.* v. *FTC*, 884 F.2d at 1496-1497. In this case, the court of appeals conducted a thorough, detailed review of the factual finding challenged by petitioner in order to ascertain the reasonableness of the Commission's decision (see Pet. App. 17a-18a); that detailed review may hardly be termed "perfunctory."

forms of unprotected speech—fighting words, incitement to riot, obscenity, and child pornography—in order "to ensure that protected expression will not be inhibited." 466 U.S. at 504-505. But *Bose* did not state or imply that a similar approach is required in the context of commercial speech. To the contrary, the Court explicitly noted that there is only "minimal 'danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive' " commercial speech. *Id.* at 504 n.22 (quoting *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring)). Given the stated rationale for requiring independent appellate review in non-commercial-speech cases—*i.e.*, the need "to ensure that protected expression will not be inhibited," 466 U.S. at 505—the Court's pointed observation that commercial speech is unlikely to be chilled strongly suggests that there is no need for independent appellate review in commercial-speech cases.

Peel is not to the contrary. In that case, an attorney was censured by the Illinois Supreme Court for violating a state ethics rule by using letterhead that described him as a certified legal specialist. This Court reversed and remanded, holding that the State's ethics rule violated the First Amendment. 496 U.S. at 111 (plurality opinion); *id.* at 112 (Marshall, J., concurring in the judgment). In rejecting the state supreme court's conclusion that representations about certification as a specialist were inherently misleading and thus not entitled to First Amendment protection, the plurality in *Peel* observed that "[w]hether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exer-

cise *de novo* review," citing *Bose* as analogous authority. *Id.* at 108.

Significantly, however, neither the attorney disciplinary commission nor the state supreme court in *Peel* had ever made any factual finding that the attorney's letterhead was actually deceptive. 496 U.S. at 101 (plurality opinion).[7] Instead, the state supreme court concluded, "as a matter of law, that [the attorney's] claims * * * were necessarily misleading." *Ibid.* Thus, *Peel* provided no occasion for the Court to address the question whether the First Amendment requires independent appellate review of *factual* findings by lower tribunals in commercial-speech cases; the plurality opinion cited *Bose* only by way of analogy as support for the indisputable proposition that the Court should exercise *de novo* review over the conclusion that a statement was inherently deceptive *as a matter of law.*

Moreover, a majority of the Members of the *Peel* Court never expressed an opinion on the question whether *de novo* review was appropriate in that context, nor did they cite *Bose.*[8] *Peel* thus cannot be read

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[7] In the present case, of course, the Commission determined as a factual matter that petitioner's advertising claims were deceptive. Pet. App. 23a, 37a-65a.

[8] Petitioner asserts (Pet. 13-14) that "Justice Marshall and Justice White, while not explicitly citing *Bose*, also clearly engaged in independent review in deciding" whether the challenged statement was inherently deceptive. Petitioner does not identify the particular passages that purportedly support that assertion, however, and we discern no basis for it in the actual language used by Justices White and Marshall. In any event, it need hardly be said that this Court does not decide important and controversial questions of constitutional law by avoiding any discussion of them.

to hold that a reviewing court must exercise independent review over factual findings in commercial-speech cases, and it sheds no light on the appropriate standard of appellate review in this case.

Petitioner also errs in contending (Pet. 13) that the courts of appeals have reached conflicting decisions concerning the need for *de novo* review of factual findings in commercial-speech cases. In the first place, none of the cases cited by petitioner involved appellate review of findings by the Commission, which has extensive experience and special expertise in the area of deceptive advertising.[9] Even if independent review were appropriate when appellate courts review trial court findings in commercial-speech cases, it would not necessarily follow that the same rule should apply in cases under the FTC Act. As this Court has recognized, the Commission, "which deals continually with cases in the area [of deceptive advertising], * * * is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the [FTC] Act." *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 385. Indeed, there would have been little reason for the statutory vesting of jurisdiction over such cases in the Commission if the function of de-

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[9] Numerous decisions of the courts of appeals recognize the Commission's expertise in ascertaining the meaning of advertisements. See, *e.g.*, *Thompson Medical Co.* v. *FTC*, 791 F.2d at 197; *American Home Prods. Corp.* v. *FTC*, 695 F.2d at 686-687; *Litton Indus., Inc.* v. *FTC*, 676 F.2d 364, 369 (9th Cir. 1982); *Porter & Dietsch, Inc.* v. *FTC*, 605 F.2d 294, 300 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *Simeon Management Corp.* v. *FTC*, 579 F.2d 1137, 1145 (9th Cir. 1978); *National Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d 157, 161 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978).

termining the material facts were ultimately to be performed independently by reviewing courts.[10]

Moreover, the cases cited by petitioner are inapposite for other reasons as well. *Lindsay* v. *City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), cert. denied, 484 U.S. 1010 (1988), is not a commercial-speech case at all; rather, it involved a content-neutral ban on portable signs, a ban that affected commercial and non-commercial speech equally. 821 F.2d at 1105. *Lindsay* thus provides no guidance in determining the appropriate standard of appellate review in pure commercial-speech cases.

Similarly, *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988), while it did involve commercial speech, does not hold that appellate courts must apply *de novo* review to purely *factual* findings of lower tribunals in commercial-speech cases, which is the only claim properly before the Court in this case.[11] The

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[10] Petitioner's contention (Pet. 15-20) that independent review must be applied regardless of the identity of the trier of fact rests upon non-commercial-speech cases where independent review has been held to be a necessity because of the substantial risk in that context that freedom of expression will otherwise be chilled. Moreover, the cases petitioner cites in which courts refused to accord deference to agency determinations involved agencies that did not possess the Commission's congressionally mandated and judicially recognized expertise in the subject matter at issue.

[11] In the court of appeals, petitioner argued that the First Amendment required the court to scrutinize independently the Commission's "finding that the Class Picture ads convey the milk equivalency claim." Pet. C.A. Br. 32. Petitioner now attempts to recast its argument more broadly, suggesting that

court in *Don's Porta Signs* held instead that "an appellate court is not bound by the 'clearly erroneous' standard of review in determining whether a commercial speech regulation directly advances the government's goals or is more extensive than necessary." 829 F.2d at 1053 n.9. Those determinations, of course, are mixed questions of law and fact rather than pure questions of fact, and they involve ultimate constitutional questions rather than subsidiary factual issues. *Bose* itself indicates that, even where *de novo* review of ultimate constitutional questions is appropriate, deference must still be given to purely factual findings of lower courts. 466 U.S. at 513-514 & n.31. Thus, *Don's Porta Signs* is completely consistent with the decision below.[12]

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this Court should undertake *de novo* review of the Commission's "finding that commercial speech is misleading and therefore unprotected by the First Amendment." Pet. I. The fact remains, however, that petitioner merely asked the court of appeals to review *de novo* the Commission's purely factual finding that a particular implied claim was made by a particular advertisement. Because petitioner sought independent review in the court of appeals of that particular factual finding only, the issue before this Court is limited to whether review of such a finding is constitutionally mandated. See, *e.g.*, *EEOC* v. *FLRA*, 476 U.S. 19, 24 (1986) (Court's "normal practice * * * is to refrain from addressing issues not raised in the Court of Appeals"). Moreover, independent review of that subsidiary factual finding is the only form of appellate scrutiny that could possibly advance petitioner's cause, because it is undisputed that if the claims in question were made, they were deceptive.

[12] Moreover, the speech at issue in *Don's Porta Signs* was unquestionably protected commercial speech, and thus that case provides no support for petitioner's assertion that *de novo* appellate review is appropriate in deciding whether com-

Finally, *Braun* v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), is very distinct from this case. While *Braun* may arguably be characterized as a commercial-speech case, it is an example of a significantly different category of cases from that presented here. In *Braun*, a wrongful death action was brought against the publishers of a magazine, alleging that they had negligently published an advertisement that created an unreasonable risk of solicitation of violent criminal activity. Thus, the defendants were not the persons whose speech had proposed a commercial transaction. As the court itself recognized, therefore, "[t]his case poses a greater risk than one finds in ordinary commercial speech cases that a state's regulatory regime or tort law will impermissibly chill publishers." 968 F.2d at 1117.

Braun would be apposite only if the Commission had brought the present case, not against petitioner, but against the television networks that ran petitioner's advertisements. Whatever the appropriate standard of appellate review may be in that category of cases, which present considerably more danger of a chilling effect, *Braun* cannot be read to hold that *de novo* review is required in more traditional deceptive-advertising cases where the risk that commercial speech will be chilled is minimal or nonexistent. See, *e.g.*, *Bose*, 466 U.S. at 504 n.22.[13]

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mercial speech falls outside the scope of the First Amendment's protections entirely.

[13] *Braun* is also distinguishable because the court in that case applied *de novo* review only to the ultimate question whether the publisher owed a legal duty under state law to the plaintiffs. 968 F.2d at 1120-1121. That mixed question of law and fact is more suited to *de novo* review than is the

Thus, no decision of this Court or of any court of appeals holds that independent, *de novo* review of factual findings should be exercised in deceptive-advertising cases.[14] The conflict alleged by petitioner does not exist, and further review is unnecessary.

b. In any event, *Bose* and *Peel*, even if fully applicable to the Commission's deceptive-advertising determinations, would not support petitioner's claim in this case. Nothing in the holdings or rationale of those decisions would suggest the propriety of *de novo* appellate reassessment of the Commission's purely factual finding that a particular claim was made in a particular advertisement. To the contrary, although an appellate court engaged in independent review is to reweigh whether the aggregation of facts found by the lower tribunal is sufficient to support the determination of an ultimate fact that is constitutionally required, the court must accept the pure (*i.e.*, historical) factual findings that are subsidiary in nature if supported by the record. See, *e.g.*, *Bose*,

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purely factual question at issue in this case, *i.e.*, the question whether a particular advertisement makes a particular claim.

[14] The *only* case identified by petitioner that reaches that conclusion is a district court decision, *Puerto Rico Tele-Com, Inc.* v. *Ocasio Rodriguez*, 747 F. Supp. 836 (D.P.R. 1990). In that case, while purportedly applying independent judgment to a government agency's determination as to the misleading nature of an advertisement, the court nonetheless accorded some deference to the agency by "acknowledging the view of an agency experienced in dealing with [misleading advertising]." *Id.* at 843-844. In any event, *Puerto Rico Tele-Com* is based upon a misreading of *Peel*, because it wrongly suggests that this Court refused to defer to the State's finding of deception. 747 F. Supp. at 843. In actuality, no such factual finding was ever made by the State in *Peel*. See *Peel*, 496 U.S. at 98 (plurality opinion).

466 U.S. at 513-514 & n.31; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285-286 & n.26 (1964). The scope of independent review is therefore limited to evaluating the conclusion to be drawn from the aggregation of facts, which conclusion may be characterized as a question of constitutional fact.

The Commission's finding that a particular claim was made is a question of pure or historical fact. See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 386 (sustaining Commission finding that a claim was made because "this is a matter of fact resting on an inference that could reasonably be drawn from the commercials themselves"); *Removatron Int'l Corp.* v. *FTC*, 884 F.2d at 1496-1497; *Thompson Medical Co.* v. *FTC*, 791 F.2d at 197; *Bristol-Myers Co.* v. *FTC*, 738 F.2d at 562; *American Home Prods. Corp.* v. *FTC*, 695 F.2d at 686-687. Here, as in *Bose*, independent appellate review would not entail reassessment of such subsidiary historical facts.[15] Rather, independent review would, at most, encompass constitutional facts—here, the ultimate determination of deceptiveness.[16] But in a straightforward

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[15] It would be burdensome and inefficient to involve the appellate courts in *de novo* reassessment of whether claims have been made by particular advertisements. To do so would encourage the taking of appeals solely for fact-finding purposes and would enmesh the courts of appeals (and, ultimately, this Court) in the "resolution of exceedingly complex and technical factual issues." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 645 (1985). Moreover, petitioner's reasoning would result in heightened review not only of Commission cases, but also of the increasing number of false-advertising cases brought by private parties under the Lanham Act, 15 U.S.C. 1125(a).

[16] This Court's decision in *Colgate-Palmolive* is particularly instructive. As the Court observed in that case, "the words

and purely factual false-advertising case like this one, such independent appellate review would be little more than an empty formality, because it is now well settled that it is a deceptive practice to make false claims about a product's significant attributes. See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 389. Thus, petitioner would not be entitled to relief even under its preferred standard of review.

There is, in sum, no basis for petitioner's claim that 15 U.S.C. 45(c), which requires findings of the Commission to be affirmed if supported by substantial evidence, cannot constitutionally be applied to the Commission's findings in deceptive-advertising cases. Further review of this issue is not warranted.

2. Petitioner also contends (Pet. 20-27) that, under the FTC Act and the Constitution, the Commission is *never* permitted to find that implied claims have been made in advertising unless it relies upon extrinsic evidence. That contention is incorrect, and is not worthy of review.

a. This case provides no occasion to resolve the question posed by petitioner, because the Commission in fact considered the available extrinsic evidence and

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'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction." 380 U.S. at 385. The Court then accepted as reasonable the Commission's factual findings with respect to the claims made, and proceeded to the ultimate question of deceptiveness by determining that the Commission correctly interpreted the statute as prohibiting "the misrepresentation of *any* fact so long as it materially induces a purchaser's decision to buy," rather than only such misrepresentations of "the substantive qualities of a product." *Id.* at 386-387. The Court then upheld the Commission's inference "that the deception will constitute a material factor in a purchaser's decision to buy" as sufficiently supported by the record. *Id.* at 392.

concluded that it supported the Commission's reading of petitioner's advertisements. Pet. App. 47a & n.13, 50a & n.14, 51a & n.15; see *id.* at 17a-18a.[17] Petitioner does not ask this Court to review the Commission's conclusions in that regard; nor does petitioner claim that it sought to introduce any additional extrinsic evidence and was prevented from doing so. Thus, petitioner would not be entitled to any relief even if the legal standard it espouses were to be adopted by this Court. Accordingly, review of this issue is not warranted.

b. Petitioner principally contends (Pet. 20-24) that the Commission and the court of appeals in this case have created a conflict with numerous cases decided under the Lanham Act by construing the FTC Act to permit the Commission to make findings of implied claims based solely on its consideration of an allegedly deceptive advertisement itself, without looking to extrinsic evidence of the advertisement's meaning. As petitioner observes, courts often look to extrinsic evidence in deciding deceptive-advertising cases under the Lanham Act. That fact does not suggest, however, that the Commission should be required to adhere to that same practice in FTC Act cases.

Federal district judges possess no special expertise in interpreting advertising, and thus recourse to ex-

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[17] The Commission does not ignore extrinsic evidence if presented, but instead considers it to the extent it is probative. Pet. App. 40a-41a; see, *e.g.*, *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583, 587-589 (D.C. Cir. 1970); FTC Policy Statement on Deception, appended to *In re Cliffdale Assocs.*, 103 F.T.C. 110, 174, 176 (1984). Judge Manion's concern (Pet. App. 27a) that the Commission is "free to ignore any such extrinsic evidence" is therefore unfounded.

trinsic evidence is often appropriate in the Lanham Act context, although there is no absolute requirement that such evidence be presented.[18] The Commission, by contrast, has extensive experience in this area, and thus has no need to consider extrinsic evidence in many cases. Indeed, numerous courts have explained judicial reliance on extrinsic evidence in Lanham Act cases in precisely this manner, while at the same time indicating that the Commission, with its specialized expertise, is not bound by similar constraints. See, *e.g.*, Pet. App. 13a-14a; *Sandoz Pharmaceuticals Corp.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222, 228 (3d Cir. 1990); *American Home Prods. Corp.* v. *Johnson & Johnson*, 577 F.2d 160, 172 n.27 (2d Cir. 1978); *Procter & Gamble Co.* v. *Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1094 (S.D.N.Y.), aff'd, 747 F.2d 114 (2d Cir. 1984). Accordingly, there is no conflict between the decision below and the cases construing the Lanham Act, and thus there is no "anomaly" (Pet. 22) for this Court to resolve.

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[18] Contrary to petitioner's assertions (Pet. 21), courts adjudicating deceptive-advertising claims under the Lanham Act have often found implied claims that are reasonably apparent from the face of the advertisements without reliance on extrinsic evidence. See, *e.g.*, *Johnson & Johnson* v. *GAC Int'l, Inc.*, 862 F.2d 975, 980 (2d Cir. 1988) (advertisement using "polysapphire" facially false because term "would suggest to most people * * * a substance made of many sapphires, or some variety or form of sapphire"); *Better Business Bureau, Inc.* v. *Medical Directors, Inc.*, 681 F.2d 397, 403 (5th Cir. 1982) (deceptive claim "clearly impl[ied]" by advertisements themselves); *American Home Prods. Corp.* v. *Johnson & Johnson*, 654 F. Supp. 568, 583 (S.D.N.Y. 1987) (survey evidence unreliable; false implication found from text of literally true advertisement).

Petitioner attempts to disparage the reasoning of the courts that have rejected its argument, and cites a series of law review articles for the proposition that the Commission in fact has no special expertise in this area. Pet. 22-24. But the unanimous judgment of this and other courts is to the contrary: The Commission's experience in the interpretation of advertising has been widely recognized and accepted,[19] and the law is clear that the FTC Act authorizes the Commission to rely upon its own reasoned analysis in determining what claims, including implied ones, are made by a particular advertisement, as long as those claims are reasonably clear from the face of the advertisement. Pet. App. 13a; see, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 386, 391-392; *Thompson Medical Co.* v. *FTC*, 791 F.2d at 197; *Bristol-Myers Co.* v. *FTC*, 738 F.2d at 562-563; *American Home Prods. Corp.* v. *FTC*, 695 F.2d at 687 n.10; *Simeon Management Corp.* v. *FTC*, 579 F.2d at 1146 n.11.

c. Petitioner also contends (Pet. 25-27) that the Commission's practice of deciding some cases without reliance on extrinsic evidence will impermissibly chill truthful, non-misleading advertising. As this Court has repeatedly recognized, however, there is only "a minimal 'danger that governmental regulation of false or misleading * * * product advertising will chill accurate and nondeceptive commercial expression.' " *Bose*, 466 U.S. at 504 n.22 (quoting

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[19] See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 385; *Thompson Medical Co.* v. *FTC*, 791 F.2d at 197; *American Home Prods. Corp.* v. *FTC*, 695 F.2d at 687 n.10; *Litton Indus., Inc.* v. *FTC*, 676 F.2d at 369; *Porter & Dietsch, Inc.* v. *FTC*, 605 F.2d at 300; *Simeon Management Corp.* v. *FTC*, 579 F.2d at 1145; *National Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d at 161.

Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring)); see, *e.g.*, *Board of Trustees* v. *Fox*, 492 U.S. 469, 481 (1989); *Bates* v. *State Bar*, 433 U.S. 350, 381, 383 (1977).

Moreover, as the court of appeals recognized (Pet. App. 15a-16a), this Court's decision in *Zauderer* v. *Office of Disciplinary Counsel*, *supra*, establishes that no First Amendment concerns are raised where, as here, reasonably apparent implied claims are found without the use of consumer surveys or other extrinsic evidence. The advertising at issue in *Zauderer*, like the advertisements at issue in this case, was literally true but implicitly misleading on its face. The Court held that "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the * * * public before it [may] determine that the [advertisement] had a tendency to mislead.'" 471 U.S. at 652-653 (quoting *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 391-392). Under *Zauderer*, the Commission's practice of discerning facially apparent implied claims without reliance on extrinsic evidence is entirely appropriate.[20]

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[20] Petitioner maintains that *Zauderer* is distinguishable because the advertisement at issue in that case was "facially misleading" based upon "normal definitions," whereas here, the alleged false claims are not derived from "common understandings," but from "inferences and deductions that consumers supposedly would make." Pet. 27. In both *Zauderer* and this case, however, the advertisement was found to be deceptive based on the common-sense assumption, made without resort to extrinsic evidence, that consumers would misinterpret literally truthful wording due to omitted information of which they would likely be unaware. See 471 U.S. at 652; Pet. App. 42a-55a, 57a-58a. Petitioner may doubt the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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correctness of that common-sense assumption on the facts of this case, but that doubt reflects nothing more than a fact-bound disagreement about the application of settled legal principles; *Zauderer* unambiguously holds that the First Amendment permits a finding of implicit deceptiveness without recourse to extrinsic evidence.

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